IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

FRIDAY, THE 12TH DAY OF MARCH 2021 / 21ST PHALGUNA, 1942

Crl.Rev.Pet.No.641 OF 2020

AGAINST THE ORDER/JUDGMENT IN CRL.MP.NO.2577 OF 2019 IN CC 73/2019 OF CHIEF JUDICIAL MAGISTRATE ,TRIVANDRUM/SPECIAL COURT FOR TRIAL OF CYBER CRIME

REVISION PETITIONER/S:

STATE OF KERALA
REPRESENTED BY THE STATE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY ADVS.
DIRECTOR GENERAL OF PROSECUTION
SRI.P.NARAYANAN, SENIOR GOVT. PLEADER
SRI.V.MANU, SENIOR GOVT. PLEADER
SRI.K.K.RAVINDRANATH, ADDL.ADVOCATE GENERAL

RESPONDENT/S:

1 **K.AJITH**
AGED 49 YEARS
S/O.KESAVAN, AGED 49 YEARS,
ANJANAM (SHANTHALAYAM), THEKKENADA, VAIKOM, VAIKOM TALUK, KOTTAYAM DISTRICT-686141.

2 **KUNJAMMADU MASTER, S/O.IBRAHIM, AGED 71 YEARS, KURUNGOTTU VEEDU, NEAR MARUTHERI, MENJANEEYAM VILLAGE, KOYILANDI TALUK, KOZHIKODE DISTRICT-673 525.**

3 **E.P.JAYARAJAN, S/O.KRISHNAN NAMBIAR, HAVING PERMANENT RESIDENCE AT JAISON HOUSE, AAROLI, PAPPINISSERRY VILLAGE, KANNUR DISTRICT – 670566.**

4 **C.K.SADASIVAN, AGED 67 YEARS, S/O.KUMARAN, CHUNGAPPURAKKAL HOUSE, KUPPAPURAM, KAINAKARU VADAKKU VILLAGE, KUTTANADU TALUK, ALAPPUZHA-688011.**

5 **V.SIVANKUTTY, S/O.VASUDEVAN PILLAI, MULLAKKAL HOUSE, TC-36/1241, 9, SUBHASH NAGAR, PERUNTHANNI, PETTAH VILLAGE, VALLAKADAVU P.O., THIRUVANANTHAPURAM DISTRICT-695008.**

6 **K.T.JALEEL, S/O.K.T.KUNJU MUHAMMED, HAVING PERMANENT RESIDENCE AT "GHAZAL HOUSE", MEENPARA, VALANCHERRY, KATTIPARUTHI VILLAGE, THIRUR TALUK, MALAPPURAM DISTRICT-676552.**

ADDL. **7** **AJITH KUMAR T.,**
S/O.THANKAPPAN NAIR, GOPALAKRISHNA MARKET ROAD, SREEKARYAM P.O., THIRUVANANTHAPURAM-695017.

ADDL. 8 **RAMESH CHENNITHALA, AGED 60 YARS,**
S/O.LATE V.RAMAKRISHNAN NAIR, MEMBER, KERALA LEGISLATIVE ASSEMBLY, RESIDING AT CANTONMENT HOUSE, THIRUVANANTHAPURAM, PIN-695 033.

ADDITIONAL 7TH RESPONDENT IS IMPLEADED AS PER ORDER DATED 12.3.2021 IN CRL.M.APPL.3 OF 2021
ADDITIONAL 8TH RESPONDENT IS IMPLEADED AS PER ORDER DATED 12.3.2021 IN CRL.M.APPL.4 OF 2021.

BY ADV. R.V.SREEJITH
BY ADV. SRI.SUVIN.R.MENON
BY ADV. T.ASAFALI
BY ADV. SRI.P.K.SAJEEVAN
BY ADV. SMT.LALIZA.T.Y.
BY ADV. SRI.C.RAJENDRAN
BY ADV. SRI.S.BIJU (KIZHAKKANELA)

OTHER PRESENT:

SR.GP.SUMAN CHAKRAVARTHY FOR DGP

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 23.11.2020, ALONG WITH Crl.Rev.Pet.662/2020, THE COURT ON 12.3.2021 PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

FRIDAY, THE 12TH DAY OF MARCH 2021 / 21ST PHALGUNA, 1942

Crl.Rev.Pet.No.662 OF 2020

AGAINST THE ORDER/JUDGMENT CRL.M.P.NO.2577 OF 2019 IN IN CC 73/2019 OF CHIEF JUDICIAL MAGISTRATE ,TRIVANDRUM/SPECIAL COURT FOR TRIAL OF CYBER CRIME

REVISION PETITIONER/S:

1 **K.AJITH**
AGED 49 YEARS
S/O.KESAVAN, ANJANAM (SHANTHALAYAM), THEKKENADA, VAIKKOM, VAIKKOM TALUK, KOTTAYAM DISTRICT.

2 **SRI.KUNJAMMADU MASTER,**
AGED 71 YEARS
S/O.SRI,IBRAHIM, KURUNGOTTU VEEDU, NEAR MARUTHERI, MENJANEEYAM VILLAGE, KOYILANDI TALUK, KOZHIKODE DISTRICT.

3 **SRI.E.P.JAYARAJAN,**
AGED 70 YEARS
S/O.KRISHNAN NAMBIAR, JAISON HOUSE, AAROLI, PAPPINISSERY VILLAGE, KANNUR DISTRICT.

4 **SRI.C.K.SADASIVAN,**
AGED 67 YEARS
S/O.KUMARAN, CHUNGAPURAKKAL HOUSE, KUPPAPURAM, KAINAKARI VADAKKU VILLAGE, KUTTANADU TALUK, ALAPPUZHA DISTRICT.

5 **V.SIVANKUTTY,**
AGED 66 YEARS
S/O.VASUDEVAN PILLAI, MULLAKKAL HOUSE, TC36/1241, SUBHASH NAGAR, PERUNTHANNI, PETTAH VILLAGE, THIRUVANANTHAPURAM DISTRICT.

6 **SRI.K.T.JALEEL,**
AGED 53 YEARS
S/O.SRI,KUNJU MUHAMMED, GAZAL HOUSE, MEENPARA, KATTIPARUTHI VILLAGE, THIRUR TALUK, MALAPPURAM DISTRICT.

BY ADVS.
SRI.B.RAMAN PILLAI (SR.)
SRI.R.ANIL
SRI.M.SUNILKUMAR
SRI.SUJESH MENON V.B.
SRI.T.ANIL KUMAR
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SMT.S.LAKSHMI SANKAR
SHRI.RESSIL LONAN
SRI.THOMAS SABU VADAKEKUT

RESPONDENT/S:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI-682 031.

R1 BY SRI.SUMAN CHAKRAVARTHY, SENIOR GOVT.PLEADER
R1 BY SRI.K.K.RAVINDRANATH, ADDL.ADVOCATE GENERAL

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 23.11.2020, ALONG WITH Crl.Rev.Pet.641/2020, THE COURT ON 12.03.2021 PASSED THE FOLLOWING:

'C.R'

V.G.ARUN, J.

CRL.R.P.Nos.641 and 662 of 2020

Dated this the 12th day of March, 2021

O R D E R

These criminal revision petitions are filed by the State of Kerala and the accused in C.C.No. 73 of 2019, pending on the files of the Chief Judicial Magistrate's Court, Thiruvananthapuram. The common grievance of the revision petitioners is against the order dismissing the application filed by the Public Prosecutor, seeking permission to withdraw from the prosecution against the accused.

2. The essential facts are as follows;

On 13.3.2015, at about 8.55 a.m., while the Finance Minister of the State was presenting the Budget for the financial year 2015-2016 in the Kerala Legislative Assembly Hall, the accused, who, at that time were opposition MLAs, disrupted the budget presentation, climbed over to the Honourable Speaker's dais, damaged articles like the Speaker's chair, computer, mike, emergency lamp etc. and thereby caused a loss of Rs.2,20,093/- to the Government. On receipt of

information regarding the incident from the Legislature Secretary, Crime No.236 of 2015 was registered at the Museum Police Station, Thiruvananthapuram for offences punishable under Sections 447, 427 read with 34 of IPC and Section 3(1) of the Prevention of Damage to Public Property Act. Investigation of the crime was later entrusted with the Deputy Superintendent of Police, E.O.Wing-I, Crime Branch CID, Thiruvananthapuram. On completion of investigation and submission of the final report, cognizance was taken for the aforementioned offences. Later, the Public Prosecutor sought permission to withdraw from the prosecution by filing Crl.M.P.No.2577 of 2019 under Section 321 Cr.P.C. The learned Chief Judicial Magistrate refused to accept the reasons highlighted in the petition like, immunity provided under Article 194(3) of the Constitution of India , illegality in having registered the crime without prior sanction from the Speaker, insufficiency of evidence, irreparable injury that will be caused to the Legislative Assembly by dragging its proceedings to the criminal court, thereby adversely affecting public interest and public order and most importantly, the decision to withdraw from the prosecution being the absolute prerogative of the Public Prosecutor and the very limited role of the court while considering the application. Further, the allegations were found to be serious in nature and that being participants in the lawmaking process, the accused were expected to obey the laws. According to the learned CJM, granting permission to withdraw from

the prosecution will give a wrong message to society.

3. Assailing the legality of the impugned order and justifying the request for withdrawal, Sri.K.K.Ravindranath, learned Additional Advocate General put forth elaborate and persuasive arguments, which were ably supported and supplemented by Sri.B.Raman Pillai, learned Senior Counsel appearing for the accused. Sri.T.Asaf Ali, learned counsel appearing for the Leader of the Opposition, who was heard by the trial court while considering the petition seeking withdrawal, refuted the grounds of challenge and argued in support of the findings in the impugned order. Advocate Sri.R.V.Sreejith, appearing for the additional 7th respondent in Crl. R.P. No.641 0f 2020, an interested third party, contended that the findings in the impugned order being well founded, warrants no interference.

4. Briefly put, the contentions urged on behalf of the petitioners are as under;

The 2015-2016 Budget Session of the Kerala Legislative Assembly was being conducted in a charged atmosphere, the opposition having raised serious allegations of corruption and nepotism against the Finance Minister. Within the house, the opposition members had been protesting against presentation of the budget by a tainted person, while the treasury members came out in support of the Finance Minister. This led to a melee and slogan

shouting between members of the treasury and opposition benches. The alleged incident occurred during this ruckus. The members of the ruling party were equally at fault and crimes have been registered against some ruling party members, at the instance of certain lady members of the opposition, on complaints of misbehaviour. The incident having occurred while the Assembly was in session, no crime could be registered without the Speaker's sanction. The assumption of the learned Magistrate that the information leading to registration of the crime would have been with the knowledge and consent of the Speaker, since it was given by the Secretary of the Assembly, is untenable. Articles 105(3) and 194(3) of the Constitution of India confer certain privileges and immunities to the members of Parliament and State Legislatures. The alleged acts of the accused being in relation to their function as members of the Legislative Assembly, no criminal proceedings can be initiated. At best, their action will only amount to breach of privilege or code of conduct for which only the Speaker is empowered to take action. The Public Prosecutor performs an executive function while submitting an application under Section 321 and the role of the court is only supervisory. Other than considering whether the request for withdrawal is made by the Public Prosecutor on his own, without any outside influence or for extraneous considerations, the court was not expected or entitled to re-appreciate the reasons and come to a different conclusion.

5. The following precedents were cited in support of the contentions; ***State of Bihar v. Ram Naresh Pandey*** [AIR 1957 SC 389], ***Rajender Kumar Jain v. State through Spl. Police Establishment and Others*** [1980 KHC 715], ***Sheonandan Paswan v. State of Bihar and Others*** [(1987) 1 SCC 288], ***State of Kerala v. Varkala Radhakrishnan*** [ILR 2009(1) Ker.721], ***Appukuttan Pillai and Another v. State of Kerala*** [1999(1) KLJ 337], ***Razack and Others v. State of Kerala*** [2001 Crl.LJ 275].

6. Following is the summary of the counter arguments advanced by the additional respondents;

The role of the Public Prosecutor and of the Government while seeking withdrawal from the prosecution are distinct and separate. Hence, the revision petition filed by the State of Kerala, instead of the Public Prosecutor, is not maintainable. Moreover, filing of the revision petition by the Government is indicative of the Public Prosecutor having acted under compulsion. The privilege/immunity under Articles 105 and 194 cannot be extended to persons who have desecrated the sanctum sanctorum of democracy. The privileges cannot be understood as the privilege to commit criminal acts and the court is not expected to pass orders on petitions seeking withdrawal from the prosecution mechanically. The order should be rendered only after taking into account all relevant aspects, the predominant consideration

being the advancement of public justice. The petition seeking withdrawal was made by the Assistant Public Prosecutor while the case was pending before the Additional Chief Judicial Magistrate's Court (Special Court for M.P's and M.L.A's) Ernakulam. The case was later transferred and the impugned order having been passed by the Chief judicial Magistrate, Thiruvananthapuram, only the Public Prosecutor at the CJM court who was in charge of the case, could have submitted the petition. To buttress the contentions, the following decisions were relied upon;

State of Punjab v Surjit Singh and others [AIR 1967 SC 1214: ***Abdul Wahab K. v State of Kerala*** [(2018) 18 SCC 448]***: Achuthanandan v. R.Balakrishna Pillai*** [1994 KHC 346]: ***Narasimha Rao v. State (SBI/SPE)*** [AIR 1998 SC 2120]: ***Dineshan K.V. and Another v State of Kerala and Others*** [2013 (4) KHC 206]***: Jiji Thomas v. State of Kerala*** [2015 KHC 67].

7. I find no merit in the challenge against maintainability, for reason of the Government having filed the revision petition. It is true that the petition seeking withdrawal should be the result of an independent exercise of mind by the Public Prosecutor, but, the scope of Section 321 cannot be further extended to hold that, challenge against an order passed on the petition should also be made by the same Prosecutor and not the Government. The contention goes

against the very scheme of the Code of Criminal Procedure. The State is bestowed with the duty of prosecuting the offenders and Public Prosecutors are appointed under Section 24 of Cr.P.C to aid the State in that process. Moreover, a reading of the petition under Section 321 reflects independent application of mind by the Public Prosecutor.

8. The challenge on the ground of a Prosecutor other than the Public Prosecutor in charge of the case, having sought withdrawal is specious, since the petition was submitted by the Assistant Public Prosecutor at the Additional Chief Judicial Magistrate's Court (Special Court for M.P's and M.L.A's) Ernakulam, who, at that point of time, was in charge of the case. The decision in ***Surjit Singh's case*** (supra) is to the effect that only the prosecutor who is actually conducting the prosecution is entitled to file the petition seeking withdrawal.

9. Having repelled the challenge against maintainability and incompetency, I proceed to decide the revision petitions on merits.

10. Section 321 of Cr.P.C, which empowers the Public Prosecutor to seek permission to withdraw from the prosecution, reads as follows;

> "***321. Withdrawal from prosecution***.
>
> *The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,-*

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

PROVIDED that where such offence-

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case hag hot been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution."

11. The section provides for premature termination of the prosecution, which is a deviation from normal procedure and has therefore engaged the attention of the Apex Court time and again. For the sake of brevity, only the relevant among the cited decisions are

discussed.

12. In ***Ram Naresh Pande*** (supra), the accused Mahesh Desai was a member of the Bihar State Legislature, who faced the allegation of having abetted a riot by his speeches and exhortations, which resulted in the death of one person. Pending trial for the offence under Section 302/109 of IPC, the Public Prosecutor sought permission to withdraw from the prosecution against Ram Mahesh Desai on the premise that the evidence available was inadequate to proceed with the prosecution and secure the accused's conviction. The trial court granted consent, which was set aside by the High Court in the appeal filed by Ram Naresh Pandey, the first informant. The intervention by the High Court was assailed before the Apex Court by the State of Bihar and the accused. Allowing the appeals, the Apex Court held that the function of the court while considering an application under Section 494 of the old Code (corresponding to Section 321 of the Code of 1973), may well be taken as a judicial function and therefore, while granting the consent, the court must exercise judicial discretion. That, in understanding and applying the Section two main features have to be kept in mind; (i) the initiative is that of the Public Prosecutor; and (ii) what the court has to do is only to give its consent and not to determine any matter judicially.

13. Later, in ***M.N.Sankaranarayanan Nair v.***

P.V.Balakrishnan, [AIR 1972 SC 496], the position was clarified by observing that, the wide and general powers conferred on the Public Prosecutor to withdraw from the prosecution has to be exercised by him "in furtherance of, rather than as a hindrance to the object of the law and that the court, while considering the request to grant permission, should not do so as a necessary formality, by granting it for the mere asking".

14. In ***Rajender Kumar Jain*** (supra), the Apex Court culled out the following principles, laid down by the earlier decisions, at 14 of the judgment;

> "***14.*** *Thus, from the precedents of this Court, we gather:*
>
> *"1. Under the scheme of the Code, prosecution of an offender for a serious offence is primarily the responsibility of the executive.*
>
> *2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.*
>
> *3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.*
>
> *4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.*
>
> *5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes sans Tammary Hall enterprises.*

6. The Public Prosecutor is an officer of the court and responsible to the court.

7. The court performs a supervisory function in granting its consent to the withdrawal.

8. The court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution.``

15. Thereafter, the decision in ***Sheonandan Paswan*** (supra) was rendered. The basic facts therein being that, the prosecution against Dr.Jagannath Mishra***,*** one time Chief Minister of the State of Bihar, was sought to be withdrawn by the Public Prosecutor. Despite objections raised by Sheonandan Paswan, a Member of the Legislative Assembly, the jurisdictional court granted permission. When the challenge against that order before the High Court failed, Sheonandan Paswan approached the Supreme Court and a bench of three judges dismissed the appeal (***Sheonandan Paswan v. State of Bihar and Others*** [(1983) 1 SCC 438]). Thereupon a review petition was filed and the matter was re-heard by a five Judge bench. After elaborate discussion on the contours of power of the Prosecutor and the Court in an application under Section 321, the majority view was expressed by Chief Justice Bhagwati in ***Sheonandan Paswan v. State of Bihar***

and Others [(1987)1 SCC 288] holding that the power conferred on the Prosecutor to withdraw from the prosecution must be a controlled or a guided power or else it will fall foul of Article 14 of the Constitution. Such power can be exercised only with the consent of the court so that the court can ensure that the power is not abused or misused or exercised in an arbitrary or fanciful manner. Once the charge sheet is filed and prosecution initiated, it is not left to the sweet will of the State or the Public Prosecutor to withdraw from the prosecution. It was held that the paramount consideration must always be in the interest of administration of justice, which is the touchstone on which the question of whether an application for withdrawal from the prosecution can be sustained, should be determined. That, the ultimate test to be applied is whether the requirement of public justice outweighs the legal justice of that case, justifying the grant of permission to withdraw from the prosecution in the larger interest of public justice.

16. In ***Abdul Wahab*** (supra) the trial court allowed the petition seeking withdrawal, despite the Public Prosecutor having merely followed the Government's direction. Challenge against the order was set at nought by the High Court, finding the petitioner to be a third party, who had no role in the prosecution. The Apex Court interfered with the orders, finding that the petitioner, who had brought the errors committed by the trial court to the notice of the High court, could not

have been treated as a stranger and that, the trial court had failed to pass the order within the parameters of Section 321, despite the Public Prosecutor having acted as a mere post office.

17. A learned Judge of this Court in ***Appukuttan Pillai and another v. State of Kerala*** [1999 (1) KLJ 337] has held that the permission to withdraw from the prosecution can be given on the court being satisfied that the Public Prosecutor has acted in good faith and has exercised discretion while filing the application. ***Varkala Radhakrishnan*** (supra) limited the role of the court while exercising the jurisdiction under Section 321 to be supervisory and not adjudicatory. In ***Razak and Another v. State of Kerala*** [2001 Crl.LJ 275] the court went one step further to hold that neither the complainant or charge witness has *locus standi* in the exercise of discretion by the Public Prosecutor. However, said finding can longer hold good in the light of ***Abdul wahab***.

18. Going by the precedents and on a purposive interpretation of the provision, there can be no room for doubt that the absolute prerogative to request permission for withdrawing from the prosecution is vested with the Public Prosecutor. However, such discretion should be exercised free of extraneous considerations or influences and should be based on cogent and convincing reasons. Even though the court is not expected to conduct a judicial review of

the reasons which promoted the Public Prosecutor to make the application, the grant of permission is not automatic and cannot be the result of a mechanical exercise. Even if appealing grounds are made in the application, the court can refuse to grant permission on finding that the withdrawal will not aid in advancement of public justice, which is the paramount consideration.

19. Although the learned Additional Advocate General argued that withdrawal from the prosecution in the instant case will advance the interest of public justice by ensuring that the prestige of the Legislative Assembly is not lowered in the eyes of the citizens, I am unable to accept the contention. It is for the elected representatives to uphold the prestige of the House and to face the consequences for the violations, if any committed. In this regard, I find the following observation in ***Sheonandan Paswan*** (supra) to be apposite.

> *"Even if personal harassment or inconvenience may be caused by non withdrawal from the prosecution, such harassment or inconvenience must be considered as an inevitable cost to public life, which the repositories of public power should have no hesitation to pay, as justice must not only be done but must also appear to be done."*

20. The next contention is regarding the privilege and immunity provided under Articles 105(3) and 194(3) of the Constitution. Article 105 deals with the powers, privileges etc. of the Houses of Parliament and of the members and committees thereof. Similar powers,

privileges etc. are granted to the House of Legislators and to its members, as per Article 194, which is extracted hereunder;

> *"194.* ***Powers, privileges, etc, of the House of Legislatures and of the members and committees thereof.-***
>
> *(1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State*
>
> *(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings*
>
> *(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of Section 26 of the Constitution forty fourth Amendment Act, 1978*
>
> *(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature."*

21. In parliamentary language, the term 'privilege' applies to certain rights and immunities enjoyed by each House of Parliament

and the State Legislatures, its committees, and the members individually. The object of parliamentary privilege is to safeguard the freedom, the authority and the dignity of parliament. Privileges are enjoyed by individual members, because the House cannot perform its functions without unimpeded use of the services of its members; and collectively for the protection of its members and the vindication of its own authority and dignity. Going by Articles 105 and 194 of the Constitution, the Members of Parliament and of State Legislatures have complete freedom of speech and absolute immunity against proceedings in any court in respect of anything said or any vote given by such member and in respect of publication of any report, paper, votes or proceedings by or under authority of either House of Parliament, or of the State Legislature, as the case may be. However, this freedom and external influence or interference does not envisage unrestrained licence of speech within the walls of the House, such right being circumscribed by the constitutional provisions and the rules and standing orders, if any, regulating the procedure.

22. Learned Additional Advocate General laid particular emphasis on the residual protection provided under Article 194(3) and referred to certain portions from Chapter XII, in the text book on ***Practice and Procedure of Parliament*** by ***Kaul and Shakdher*** (7th Edition), dealing with Powers, Privileges and Immunities of Houses, their Committees and Members, to drive home the point that, for his speech

and action inside the Assembly a member can only be subjected to the discipline of the House and no proceedings, either civil or criminal, can be instituted against him in any court in respect of the same.

23. To counter this Contention, Sri. Asaf Ali drew attention to the following excerpt from the same Chapter, under the sub-heading 'Proceedings in Parliament and the Criminal Law';

> *"A criminal act committed by a member within the House cannot be regarded as a part of the proceedings of the House for purposes of protection. Thus, in the Maharashtra Legislative Assembly, when a member shouted at the operator to connect his mike to the loudspeaker, threw a paperweight in the direction of the loudspeaker-operator and rushed towards the Speaker and grabbed the mike in front of the Speaker, he was not only expelled from the House but was subsequently convicted under different sections of the Indian Penal Code and sentenced to rigorous imprisonment for six months."*

24. Here, the question is whether the acts allegedly committed by the accused, which, if proven, would be offences punishable under the Indian Penal Code, are to be reckoned as part of the proceedings of the House, for the purpose of their protection. The answer can only be in the negative, since privileges and immunities are provided to ensure smooth functioning of the House by guaranteeing absolute freedom to the members to speak and participate in its deliberations. Here the allegation is of the functioning of the Assembly Session having been disrupted by the members by trespassing into the Speakers Dias and

committing mischief. The aforementioned acts, if proven to be true, can, by no stretch of imagination, be deemed to be acts done in furtherance of the free functioning of the house.

25. In this regard it may be apposite to extract the following observations of the Honourable Supreme Court in ***Lokayukta Justice Ripusudan Dayal (Retired) and Others v State of Madhya Pradesh and Others*** [(2014) 4 SCC 473]***;***

> *"51. The scope of the privileges enjoyed depends upon the need for privileges i.e. why they have been provided for. The basic premise for the privileges enjoyed by the Members is to allow them to perform their functions as Members and no hindrance is caused to the functioning of the House. The Committee of Privileges of the Tenth Lok Sabha, noted the main arguments that have been advanced in favour of codification, some of which are as follows:*
>
> > *"(i) Parliamentary privileges are intended to be enjoyed on behalf of the people, in their interests and not against the people opposed to their interests;*
> >
> > ***
> >
> > *(iii) the concept of privileges for any class of people is anachronistic in a democratic society and, therefore, if any, these privileges should be the barest minimum—only those necessary for functional purposes—and invariably defined in clear and precise terms;*
> >
> > *(iv) sovereignty of Parliament has increasingly become a myth and a fallacy for, sovereignty, if any, vests only in the people of India who exercise it at the time of*

general elections to the Lok Sabha and to the State Assemblies;

(v) in a system wedded to freedom and democracy—rule of law, rights of the individual, independent judiciary and constitutional Government—it is only fair that the fundamental rights of the citizens enshrined in the Constitution should have primacy over any privileges or special rights of any class of people, including the elected legislators, and that all such claims should be subject to judicial scrutiny, for situations may arise where the rights of the people may have to be protected even against Parliament or against captive or capricious parliamentary majorities of the moment;

(vi) the Constitution specifically envisaged privileges of the Houses of Parliament and State Legislatures and their Members and committees being defined by law by the respective legislatures and as such the Constitution-makers definitely intended these privileges being subject to the fundamental rights, provisions of the Constitution and the jurisdiction of the courts;

***

(viii) in any case, there is no question of any fresh privileges being added inasmuch as (a) under the Constitution, even at present, parliamentary privileges in India continue in actual practice to be governed by the precedents of the House of Commons as they existed on the day our Constitution came into force; and (b) in the House of Commons itself, creation of new privileges is not allowed."

The Committee also noted the main arguments against codification.

Argument (vii) is as under:

> *(vii) The basic law that all citizens should be treated equally before the law holds good in the case of Members of Parliament as well. They have the same rights and liberties as ordinary citizens except when they perform their duties in Parliament. The privileges, therefore, do not, in any way, exempt Members from their normal obligation to society which apply to them as much and, perhaps, more closely in that as they apply to others.*
>
> *52. It is clear that the basic concept is that the privileges are those rights without which the House cannot perform its legislative functions. They do not exempt the Members from their obligations under any statute which continue to apply to them like any other law applicable to ordinary citizens. Thus, enquiry or investigation into an allegation of corruption against some officers of the Legislative Assembly cannot be said to interfere with the legislative functions of the Assembly. No one enjoys any privilege against criminal prosecution."*

26. The other major contention urged is regarding the illegality in having registered the crime without obtaining sanction from the Speaker of the Legislative Assembly. Other than the protection under Article 194 discussed above, no provision, which mandates sanction or permission of the Speaker before registering a crime in relation to offences committed by members inside the House was brought to my notice. Even on a careful scrutiny of the Rules of Procedure and Conduct of Business in the Kerala Assembly made in pursuance of

Article 208(1) of the Constitution of India, I could not find any such provision. Interestingly, Clause 44 in the 'Code of Conduct for the Members of the Kerala Legislative Assembly' exhorts the members to keep the fundamental duties listed in Part IV-A of the Constitution uppermost in their minds. One among the fundamental duties, as postulated by Article 51A (I), is to safeguard public property and to abjure violence.

27. The other reasons like, inadequacy of evidence, competency of the witnesses, inacceptability of documentary evidence in the absence of certification under Section 65B of the Evidence Act etc. are best left to be urged by the accused while seeking discharge, if so advised. This view is supported by the findings in ***Sheonandan Paswan*** [(1987) 1 SCC 288] extracted hereunder***;***

> *"30. The second qualification which we must introduce relates to a situation where a charge-sheet has been filed but charge has not been framed in a warrant case instituted on police report. Section 239 of the Code of Criminal Procedure, 1973 provides:*
>
> *If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.*

Now when a warrant case instituted on a police report comes before the court, the court is required to consider only the police report and the documents sent along with it and the court may make such examination, if any, of the accused as it thinks necessary and on the basis of such material if the court, after giving the prosecution and the accused an opportunity of being heard, considers the charge against the accused to be groundless, the court is bound to discharge the accused. What the court, therefore, does while exercising its function under Section 239 is to consider the police report and the document sent along with it as also any statement made by the accused if the court chooses to examine him. And if the court finds that there is no prima facie case against the accused the court discharges him. But that is precisely what the court is called upon to do when an application for withdrawal from the prosecution is made by the Public Prosecutor on the ground that there is insufficient or no evidence to support the prosecution. There also the court would have to consider the material placed before it on behalf of the prosecution for the purpose of deciding whether the ground urged by the Public Prosecutor for withdrawal of the prosecution is justified or not and this material would be the same as the material before the court while discharging its function under Section 239. If the court while considering an application for withdrawal on the ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is in fact insufficient evidence or no evidence at all in support of the prosecution, the court might as well engage itself in this exercise while considering under Section 239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the court will be performing whether the court acts under Section 239 or under Section 321. If that be so, we do not think that in a

warrant case instituted on a police report the Public Prosecutor should be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no evidence in support of the prosecution. The court will have to consider the same issue under Section 239 and it will most certainly further or advance the cause of public justice if the court examines the issue under Section 239 and gives its reasons for discharging the accused after a judicial consideration of the material before it, rather than allow the prosecution to be withdrawn by the Public Prosecutor. When the prosecution is allowed to be withdrawn there is always an uneasy feeling in the public mind that the case has not been allowed to be agitated before the court and the court has not given a judicial verdict. But, if on the other hand, the court examines the material and discharges the accused under Section 239, it will always carry greater conviction with the people because instead of the prosecution being withdrawn and taken out of the ken of judicial scrutiny the judicial verdict based on assessment and evaluation of the material before the court will always inspire greater confidence. Since the guiding consideration in all these cases is the imperative of public justice and it is absolutely essential that justice must not only be done but also appear to be done, we would hold that in a warrant case instituted on a police report — which the present case against Dr Jagannath Mishra and others admittedly is — it should not be a legitimate ground for the Public Prosecutor to urge in support of the application for withdrawal that there is insufficient or no evidence in support of the prosecution. The court in such a case should be left to decide under Section 239 whether the accused should be discharged or a charge should be framed against him."

28. The aforementioned deliberations lead to the only possible conclusion of the petition under Section 321 having been rejected for

valid and sustainable reasons, though I find no justification for the presumption in the order that the petition was filed without good faith and on extraneous influence.

In the result the criminal revision petitions are dismissed.

The observations in this order are made in the context of the issues considered and are not meant to prejudice the accused in their defence before the trial court.

Sd/-

V.G.ARUN, JUDGE

vgs